

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

MARIE DREILICH and ROLAND
DREILICH,

Plaintiffs,

vs.

Case No. 2005-1136 CH

DENNIS A. TAMBURO, MATINA
CONSTRUCTION, INC., a purported
Michigan corporation, WASHINGTON
MUTUAL BANK, FA, a national
banking corporation, SALVATORE
VIVIANO, DOMINIC MATINA,
PAUL VIVIANO and SALVATORE
MATINA, jointly and severally,

Defendants.

OPINION AND ORDER
OF THE COURT

Defendant Tamburo has filed a motion for summary disposition.

Plaintiffs filed this complaint on March 21, 2005, and filed an amended complaint on June 20, 2006. Plaintiffs allege that they purchased real property commonly known as 52185 Highbury Court, located in Shelby Township, in 1999. Plaintiffs allege that each of the named defendants apart from Dennis Tamburo either once claimed or



presently claim an interest in the subject property. Plaintiffs aver that, during May, 2000, they sought a loan in order to pay for construction costs associated with this real estate. Plaintiffs claim that they retained defendant Tamburo as their loan officer, and that he obtained defendant Washington Mutual's agreement to enter into a loan agreement and mortgage contract. Plaintiffs allege that disputes concerning work performed on their property ultimately led to a judgment being entered against them in the amount of \$45,619.63 on March 12, 2002. Plaintiffs acknowledge that they were unable to pay this judgment, and a lien was placed on their property. Plaintiffs claim that this lien caused their monthly mortgage payments to increase dramatically, preventing them from making their payments. As such, Washington Mutual foreclosed on their loan.

Once the foreclosure process had begun, plaintiffs allege that they contacted defendant Tamburo and sought financing in order to redeem their home. Plaintiffs allege that Tamburo represented that their reduced income and damaged credit would not prevent them from securing a loan. Plaintiffs allege that in February, 2004, Tamburo represented that he "had an in" with Washington Mutual, and had discussed their credit situation with the bank. Plaintiffs claim that they brought up the judgment that had been entered against them, and aver that Tamburo assured them that the judgment was void due to fraud and would not effect their efforts to refinance. Plaintiffs allege that Tamburo also "adamantly instructed [them] to not seek bankruptcy protection," claiming that he would then be unable to secure the financing they required. Plaintiffs allege that, in November, 2004, Tamburo represented that "he had a 'lock' on

an alternative financing mortgage" with a "slightly higher" interest rate than plaintiffs were currently paying. Plaintiffs allege that Tamburo gave them a "100% guarantee" that he would be able to structure a satisfactory arrangement by which Washington Mutual would be paid off and they would be able to regain their home. Plaintiffs allege that plaintiff Roland Dreilich performed drywall work for Tamburo as a condition of him procuring this financing for them, in addition to Tamburo's regular commission.

As the expiration of the redemption period approached, plaintiffs allege that Tamburo refused to answer their phone calls. Plaintiffs claim that they notified Washington Mutual of this situation, and the bank extended the redemption period for two weeks. Plaintiffs allege that they then sought and almost secured alternative financing. Plaintiffs aver, however, that this financing was denied when their potential lender conducted a title search and discovered the lien stemming from the May 12, 2002, judgment. Given plaintiffs' failure to redeem the subject property, the property was sold at a foreclosure sale. Plaintiffs allege that Tamburo subsequently acted as the loan officer for the current owners of the property,¹ and that the loan application that Tamburo prepared for the current owners contains verifiably false information. Based upon the foregoing, plaintiff brings one count for fraudulent misrepresentation as to defendant Tamburo.

Defendant Tamburo has brought the present motion for summary disposition under MCR 2.116(C)(8) and (C)(10). Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party "has failed to state a claim on

which relief can be granted." *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). All factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992); *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Arias v Talon Development*, 239 Mich App 265, 266; 608 NW2d 484 (2000). In evaluating a motion brought under this subrule, the Court considers affidavits, pleadings, deposition, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Spencer v Citizens Ins Co*, 239 Mich App 291, 299; 608 NW2d 113 (2000). When the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

As a general rule, summary disposition under MCR 2.116(C)(10) is premature if granted before discovery on a disputed issue is complete. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). The exception to this rule is where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion. *Id.*

¹ The current owners are also named as defendants in this litigation. Plaintiffs aver that the current owners were involved in a conspiracy to defraud and intentionally inflict emotional distress, although the precise allegations against them are inapposite to the disposition of the present motion.

In support of his motion for summary disposition, Tamburo argues that he made no material misrepresentations to plaintiffs. Rather, he suggests that his representations to plaintiffs constituted forward-looking promises which he intended to keep at the time he made them. Tamburo also argues that his refusal to return plaintiffs' calls led plaintiffs to cease relying on him prior to the expiration of the redemption period. Lastly, he argues that his statements were not the proximate cause of plaintiffs' injury, since they had other opportunities to obtain a loan prior to the expiration of their redemption period.

In response, plaintiffs argue that Tamburo's motion for summary disposition under MCR 2.116(C)(10) is premature, since discovery has not yet been completed. Plaintiffs argue that Tamburo's motion under MCR 2.116(C)(8) must also be denied, since plaintiffs have clearly pled the existence of circumstances which, if true, would establish that Tamburo is guilty of fraud.

The Court agrees with plaintiffs' contention that summary disposition pursuant to MCR 2.116(C)(10) would be premature. On July 31, 2006, this Court entered an Order which, *inter alia*, directed Roland Dreilich to attend a deposition at a time mutually agreeable to the parties, denied requests to strike parties newly added to this action, and provided that the depositions of Gaetano Matina and Marie Dreilich shall continue at a time mutually agreeable to the parties. As such, discovery is ongoing in this matter, and Tamburo's request for summary disposition under MCR 2.116(C)(10) must be denied.

Next, the Court turns to Tamburo's motion for summary disposition under MCR 2.116(C)(8). In order to maintain an action for fraud, plaintiff must plead that (1) there was a material representation made by defendant to plaintiff, (2) the representation was false, (3) defendant knew or should have known of the falsity at the time of making the representation, (4) defendant intended for plaintiff to act upon the representation, (5) plaintiff did act on the representation, and (6) plaintiff suffered injury as a result. See, e.g. *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 253 n 8; 701 NW2d 144 (2005).

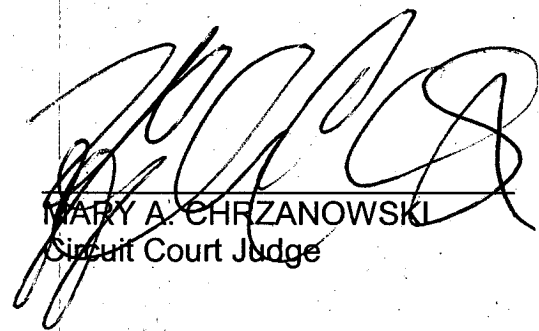
The Court has carefully reviewed plaintiffs' amended complaint, and is satisfied that plaintiffs have not failed to state a claim on which relief can be granted as to defendant Tamburo. To the contrary, plaintiffs specifically allege that Tamburo falsely represented to them that he would be able to secure financing for them so that they could redeem their home prior to the expiration of the statutory redemption period. Plaintiffs have also alleged that Tamburo was either unable or unwilling to secure the promised financing, thereby rendering his representations false. Plaintiffs further allege that Tamburo subsequently represented two of the other defendants in this matter in obtaining a loan secured by the subject property. This subsequent course of action certainly suggests some impropriety on Tamburo's part, from which it is reasonable to infer that Tamburo knew his representations were false at the time he made them. Tamburo's alleged course of action also suggests that he intended for plaintiffs to act (or, rather, refrain from acting) because of his representations. Furthermore, plaintiffs allege that, in reliance on Tamburo's misrepresentations, they declined to either declare

bankruptcy or seek alternate financing until shortly before the redemption period ended. They allege that they lost their home as a direct result of their reliance on Tamburo's misrepresentations.

In light of the factual allegations contained in plaintiffs' complaint, there is no question that plaintiffs have stated a claim against Tamburo for fraudulent misrepresentation. Therefore, summary disposition pursuant to MCR 2.116(C)(8) is not warranted.

For the reasons set forth above, defendant Tamburo's request for summary disposition under MCR 2.116(C)(10) is DENIED without prejudice, while his request for summary disposition under MCR 2.116(C)(8) is DENIED with prejudice. Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

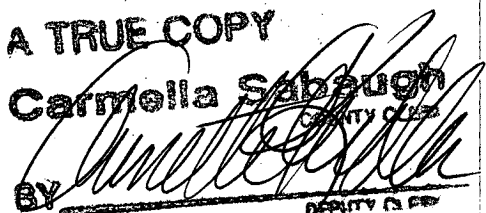


MARY A. CHRZANOWSKI
Circuit Court Judge

Dated: August 24, 2006

cc: Richard Urbis, Atty for Plft
John R. Tatone, Atty for Deft Dennis Tamburo
Jordan S. Bolton, Atty for Deft Washington Mutual
Ralph Colasuonno, Atty for Deft Matina

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Carmella Sabough
BY 
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